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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BENJAMIN RAPHAN and MYRNA RAPHAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether a taxpayer whose business affairs were investigated by a federal grand jury, but who was not a target of the investigation and was not indicted, has standing to contest disclosure of grand jury material relating to him.

2. Whether the court below was correct in holding that *United States* v. *Baggot,* 463 U.S. 476 (1983), should not be applied retroactively.

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The petitioners Benjamin and Myrna Raphan respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on April 4, 1985.

OPINION BELOW

The opinion of the Court of Appeals, reported at 759 F.2d 879 (Fed. Cir. 1985), appears in the appendix hereto. (App. 1a-16a).

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on April 4, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE OR RULE INVOLVED

Federal Rules of Criminal Procedure 6(e):

* * *

> (2) General Rule of Secrecy. A grand jury, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . .
>
> (3) Exceptions.
>
> . . . .
>
> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding.

STATEMENT OF THE CASE

Petitioners sued in the Claims Court for a refund of taxes, interest, and penalties for the tax years 1970 and 1971 under 28 U.S.C. § 1346. The suit arose out of the disallowance by the Commissioner of Internal Revenue of losses claimed by petitioners deriving from the Buchanan Apartment Associates partnership ("Buchanan").

Prior to trial, petitioners served interrogatories on the government requesting it to identify or produce every document in its possession related to Buchanan. The government moved for a protective order, contending that the documents were originally obtained in a grand jury investigation of the Pomponio family in Northern Virginia, and thus were protected from disclosure by Rule 6(e), Fed. R. Crim. P. The Claims Court denied the government's motion as premature and "without prejudice to right of defendant to renew motion in the event plaintiff seeks to compel production of documents after defendant has answered or objected to the subject interrogatories." (App. 17a). The government never renewed its motion, but it searched for and located over 1,600 responsive documents, all of which were turned over to petitioners without further objection. It designated 200 of the documents as exhibits for trial.

Petitioners moved to suppress the introduction of the grand jury documents on the ground that they were disclosed to the Internal Revenue Service in violation of Rule 6(e). Respondent argued that it obtained the grand jury documents pursuant to an order issued *ex parte* by the United States District Court for the Eastern District of Virginia dated May 5, 1972. This order provided:

> that the secrecy of the aforesaid Grand Jury proceedings be lifted to the extent that authorized representatives and agents of the Internal Revenue Service may have access to books, papers, records, and testimony which may be produced in said proceedings, and it is further
>
> ORDERED that the transcripts of testimony and documentary evidence used, presented, and ac-

> quired, and to be used, presented, and acquired for said Grand Jury proceedings may be turned over to the authorized representatives and agents of the Internal Revenue Service for purposes of carrying out their responsibilities in any and all proceedings of a civil or criminal nature. (App. 18a-19a).

Petitioners contended that this order was invalid because disclosure was not "preliminarily to or in connection with a judicial proceeding" involving them and because no showing of particularized need had been made to support such disclosure.

The Claims Court sought guidance from the district court that issued the 1972 order as to the use of the grand jury materials at the trial in this case. (App. 26a-27a). The district court refused to rule one way or the other on the validity or scope of its earlier order. (App. 29a). Following the district court proceedings, the Claims Court held that the 1972 order was intended to permit the Internal Revenue Service ("IRS") both to use the evidence in conducting a civil tax investigation and to release that evidence to the Department of Justice for introduction in court proceedings (such as this case) arising out of those investigations. (App. 21a-23a).

On June 30, 1983, after the trial below, this Court rendered its opinions in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), and *United States* v. *Baggot*, 463 U.S. 476 (1983). In *Sells*, the Court held that grand jury materials may not, without a court order, be turned over to anyone who is not working on the criminal matters that are the subject of the grand jury investigation. In *Baggot*, the Court held that a court may not order disclosure under Rule

6(e)(3)(C)(i) to the IRS for use in a civil tax audit, because an IRS audit is not "preliminarily to or in connection with a judicial proceeding," even though the taxpayers may ultimately seek judicial redress, as did petitioners. Petitioners sought reconsideration in the Claims Court, noting that under *Sells* and *Baggot* the district court's 1972 order was invalid. The Claims Court declined to reverse its prior decision.

The Court of Appeals upheld the Claims Court's rulings, holding that (1) petitioners had no standing to attack the district court's 1972 order, (2) *Sells* and *Baggot* did not control this case, and (3) petitioners were "ill-positioned" to oppose admission of the documents, having earlier opposed the government's motion for a protective order. (App. 15a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions Of This Court And Courts Of Appeals Concerning The Standing Of Persons To Contest Disclosure Of Grand Jury Materials Under Rule 6(e).

The Court of Appeals ruled that petitioners lacked standing to attack collaterally the 1972 order authorizing disclosure of the grand jury's documents. It reasoned that (1) the order was entered in a proceeding to which petitioners were not parties, (2) the documents did not belong to petitioners, and (3) the petitioners were not targets of the grand jury investigation. (App. 15a).

This ruling is contrary to this Court's decision in *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211 (1979), which held explicitly that persons situated

similarly to petitioners have standing to oppose disclosure of grand jury materials. The respondent in that case brought civil antitrust actions against petitioners who had earlier pleaded *nolo contendre* to criminal antitrust charges. At the time of their pleas, the district court gave petitioners transcripts of their grand jury testimony. Respondent then served a request for production of documents seeking the transcripts and petitioners objected. This Court flatly rejected respondent's contention that the petitioners lacked standing to contest disclosure:

> There can be no question that there is standing under Art. III for petitioners to object to the disclosure order, as release of the transcripts to their civil adversaries could result in a substantial injury to them. Moreover, the interest petitioners assert is one legally protected under the Court's rulings concerning grand jury secrecy. One of the several interests promoted by grand jury secrecy is the protection of the innocent accused from disclosure of the accusations made against him before the grand jury. Although petitioners in the present case were indicted and pleaded nolo contendere, under our decisions they nonetheless are legally entitled to protection, as there may have been accusations made for which no indictment was returned.

Id. at 218 n.8 (citation omitted).

The Court of Appeals' ruling is also contrary to this Court's decision in *Association of Data Processing Service Organizations* v. *Camp,* 397 U.S. 150 (1970). That case held that standing is established where the party alleges "that the challenged action has caused him injury in fact, economic or otherwise" and that the "interest sought to be protected by the complainant

is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 152, 153.

Courts of Appeals have also recognized the standing of persons whose interests are implicated by disclosure of grand jury materials to contest the release of such materials. *See In re Grand Jury Proceedings (Miller Brewing Co.),* 687 F.2d 1079, 1084, n.3 (7th Cir. 1982); *In re Proceedings Before the Federal Grand Jury (Conforte),* 643 F.2d 641 (9th Cir. 1981); *United States* v. *Feeney,* 641 F.2d 821 (10th Cir. 1981).

Petitioners had standing to challenge the District Court's 1972 order because they were partners in the Buchanan project, the project was related to the Pomponios, and the grand jury that indicted the Pomponios investigated, among other things, their role in the Buchanan project. Petitioners, who were never indicted, were prejudiced by disclosure of material suggesting that they were involved with the Pomponios and that the Buchanan project was the subject of a federal grand jury investigation. Where an innocent person becomes involved in a grand jury investigation, the person should have standing to contest public disclosure of grand jury materials arising out of the investigation. One of the primary interests protected by grand jury secrecy is "to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation . . . " *United States* v. *Procter & Gamble,* 356 U.S. 677, 681-82, n.6 (1958), *quoting United States* v. *Rose,* 215 F.2d 617, 628-29 (3d Cir. 1954).

The Court of Appeals imposed unprecedented restrictions on a person's standing to contest disclosure

under Rule 6(e). Nothing in *Douglas Oil* limits the right to contest disclosure to targets of investigations or to those parties who own the documents sought to be disclosed. Moreover, the 1972 order was entered in an *ex parte* proceeding—there is no way petitioners could have contested it at that time. Petitioners properly allege an injury from a breach of grand jury secrecy.

II. There Is A Conflict Of Decisions Between The Ninth Circuit Court Of Appeals And The Decision Below

Petitioners contended below that in the aftermath of *Baggot,* there was no doubt that the grand jury documents were disclosed in violation of Rule 6(e). Under *Baggot,* the district court lacked jurisdiction to enter the sweeping 1972 order relied on by the Claims Court because disclosure was authorized long before the approach of any judicial proceeding. *See United States* v. *Baggot,* 463 U.S. 476, 480 (1983).

On remand in *Sells,* the Ninth Circuit rejected the government's contention that *Baggot* should not apply to a disclosure order entered under Rule 6(e) three years before *Baggot* was decided. *In re Sells,* 719 F.2d 985, 990 (9th Cir. 1983). The Court ruled it was bound to apply *Baggot* to the matter before it, and that the disclosure order should not have been entered. *Id.* at 990-991. In failing to apply *Baggot* to the district court's 1972 order in this case, the Court of Appeals conflicts with the Ninth Circuit's holding in *Sells* on remand.

The Court of Appeals rejected the application of *Baggot* (and *Sells*) with the terse and unexplained remark that "the facts in those cases [were] distinct from those present here." The Court of Appeals should have applied *Baggot* retroactively, which would have invalidated the district court's 1972 order. Its failure to do so places the Federal Circuit in conflict with the Ninth Circuit.

The Court of Appeals also ignored precedent of this Court establishing guidelines for determining when a decision should be applied retroactively. In *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), this Court set forth the factors to be utilized by a court in determining whether to apply retroactively a decision, *i.e.,* (1) whether the new rule of law overruled "clear past precedent" or decided an "issue of first impression whose resolution was not clearly foreshadowed, (2) whether "looking to the prior history of the rule in question, its purpose and effect . . . retrospective operation will further or retard its operation," and (3) whether "inequity" or "injustice or hardship" will be occasioned by retroactive application. *Id.* at 106-107.

The Court of Appeals should have analyzed the *Chevron* factors and applied *Baggot* retroactively. The second and third factors clearly call for retrospective application in light of the importance accorded by this Court to the values of grand jury secrecy. *See Sells,* 463 U.S. at 424. Failing to apply *Baggot* retroactively will result in the substantial disclosure of grand jury materials in pending or subsequent judicial proceedings based on orders and practices declared invalid by *Baggot.* Moreover, the *Baggot* decision was not a "clear break" with prior case law, suggesting

it should be retroactively applied. *See Stein* v. *United States,* 587 F.Supp. 6 (D. N.J. 1984).*

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Federal Circuit.

Respectfully submitted,

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* The Court of Appeals ruling that somehow petitioners are estopped from opposing disclosure since they contested the government's motion for a protective order is also in error. If *Baggot* applies retroactively, the district court's 1972 order is invalid as a matter of law. Moreover, the Federal Circuit's rationale could be applied with equal strength to respondent, which contended from the beginning that disclosure was improper.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 84-783

BENJAMIN RAPHAN AND
MYRNA RAPHAN,
Appellees,

v.

THE UNITED STATES,
Appellant.

DECIDED: April 4, 1985

Before FRIEDMAN, KASHIWA and MILLER, *Circuit Judges.*

KASHIWA, *Circuit Judge.*

Appeal from a judgment of the United States Claims Court, 3 Cl. Ct. 457 (1984), holding that: (1) James Buchanan Corporation (JBC) was the agent of Buchanan Apartment Associates (Associates) and Benjamin and Myrna Raphan (Raphan) as partners of Associates are entitled to the tax benefit of losses for 1970 and 1971, and (2) no general partner of Associates had personal liability under a construction loan and therefore each of the partners, including the Raphans as limited partners, is entitled to include the debt on that loan in the tax basis of their partnership interests. We affirm in part and reverse in part.

BACKGROUND

The principal events and agreements that have led to the present controversy are set forth in the trial court's

opinion, 3 Cl. Ct. at 459-60. We list here only those necessary to an understanding of this opinion.

The Pomponio brothers (Pomponios) planned to construct an apartment building to be known as the James Buchanan House (Buchanan House). The Pomponios transferred a 3.5 acre parcel of land to JBC, a corporation owned by the Pomponio family. The cost of and mortgage on that parcel were each $2 million.

JBC entered a contract with Pomponio-owned National Realty & Construction Co., Inc. (National Realty) to construct the building, and obtained a $9.4 million loan commitment for a permanent mortgage effective when construction was complete.

JBC had difficulty obtaining a construction loan, and the lenders of the $2 million loan were pressing for payment. The Pomponios sought a loan from the Tenzer group, a New York law firm (Tenzers). The Tenzers would not make the loan but were interested in an equity investment. It was agreed that Buchanan House would be developed by a basically 50-50 partnership of the Pomponios and the Tenzers to be called Associates. The Tenzers contributed $2 million and the Pomponios contributed the land, subject to the $2 million purchase mortgage, and the construction contract, the value of which was understood to be $2 million.

The Tenzers, which included the Raphans, were active partners in Associates.[1] The Pomponios were co-partners in Associates, the sole owners of JBC, and the sole owners of National Realty.

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[1] Benjamin Raphan was one of twelve partners in Tengran Company, which was in turn a limited partner in Enterprise Buchanan Associates (EBA). EBA was in turn a limited partner in Associates. EBA was also the sole stockholder of Virginia Tengran Corporation (Tengran Corp.), a general partner in Associates.

Royal National Bank (Royal Bank), the lender of the $9.4 million construction loan, charged 14 percent interest, which exceeded Virginia's usury limit for noncorporate borrowers such as Associates. To avoid the usury restriction, JBC was used as the borrower, and JBC and Associates executed an agreement in which JBC: "agree[d] as an agent to hold nominal title to the Property for the benefit of Principal [Associates] for so long as and at such times as the Principal shall request and direct during the course of the construction of the improvements on the Property." The agreement also provided that JBC's "sole function during the existence of this agreement shall be to hold nominal legal title to the Property for the benefit of the Principal under and subject to the Principal's written directions and instructions," and that JBC:

> shall have no discretionary authority to exercise any control over the Property or to execute any written instruments in any way relating to the Property except as set forth above, it being expressly understood that Agent [JBC] has no real interest in or duties or responsibilities in respect to the Property except to perform ministerial tasks at the written direction and instruction of Principal. Agent shall immediately forward to Principal all correspondence or other written materials relating to the Property which Agent receives.
>
> * * *
>
> All sums advanced under the Construction Loan, as well as any other funds received in connection with the construction of the building on the Property shall be delivered to, for the account of, or in accordance with the instructions of Principal. Agent may under no circumstances retain or possess any advances or portion thereof, nor any other funds or portion thereof, and will have no obligation to pay any expenses in

> connection with its carrying out of its functions and duties under this agreement. All expenses incurred by or for the account of Agent in connection with its carrying out its duties and functions under this agreement shall be paid by Principal.

Finally, it was provided that JBC "shall receive from Principal as compensation for the services to be rendered by Agent hereunder the sum of $1 thousand to be paid upon the completion of construction of the building and the funding of the Permanent Loan." A corporate resolution of JBC limited its authorized activities to holding "bare legal title to the property as agent for * * * [Associates] and to act as agent and nominal title holder" for Associates.

Because the Tenzers perceived substantial risks, it was agreed that $1,925,000 of their $2 million would be converted from a contribution to Associates' capital to a loan to JBC. The loan bore 12.47 percent interest, was secured by a second mortgage on the property, was guaranteed by the Pomponios, and could be converted, after two years, to an equity interest in Associates.

On December 16, 1969: (1) the Tenzers contributed $75,000 for their limited partnership interests and lent JBC $1,925,000, (2) the $2 million total was used to pay the existing mortgage on the land, (3) Royal Bank agreed to lend JBC up to $9.4 million as construction financing, (4) the Pomponios personally guaranteed the $9.4 million loan, and (5) JBC deeded the property to the partnership, which took the property subject to all liabilities, but assumed no other liability.

On January 28 and again on February 15, 1970, Associates deeded the property to JBC, an advance was received from Royal Bank, and JBC deeded the property back to Associates. Those transfers required payment of

transfer taxes. To avoid those taxes, the parties in late 1970 transferred title to JBC as "agent".

For convenience, the Tenzers waived their right to sign partnership checks during construction.

In December 1971, JBC permanently transferred the property to Associates. By the fall of 1972, Buchanan House was in default, and the Pomponios and a Sidney Zneimer (an officer of Royal Bank), were investigated by a grand jury. In September of 1972, the Tenzers persuaded the Pomponios to terminate their interest in Associates. After additional investments by the Tenzers, Associates completed the project. It owns and operates Buchanan House.

The Commissioner of Internal Revenue, having determined that losses claimed by Associates were those of JBC, disallowed the share of those losses claimed by the Raphans. The Raphans paid the resulting deficiency and filed claims for refund.

CLAIMS COURT DECISION

The Raphans sued in the Claims Court for refund of $2,865.65 paid as income tax, interest and penalties, plus accrued interest and costs, for taxable years 1970 and 1971. The government said JBC did not qualify as a true agent under *National Carbide Corp.* v. *Comm'r*, 336 U.S. 422 (1949), and the losses were therefore those of JBC, not those of Associates. The government further asserted that if the losses were attributable to Associates, the Raphans could not deduct them because they had an insufficient basis in their partnership interests under the Treasury Regulations in view of the Pomponios' guarantee of the construction loan.

The Claims Court concluded that JBC and Associates were not commonly controlled, and that the agency agree-

ment therefore should be given effect. The Claims Court further concluded that because the Pomponios did not guarantee the loan in their capacity as partners, that guarantee did not prohibit the Raphans from including the losses in the tax basis of their interests.

ISSUES

1. Whether the Claims Court erred in determining that JBC was, for tax purposes, a true agent of Associates.

2. Whether the Claims Court erred in determining that the Pomponios' guarantee did not result in any "personal liability" for the loan.

3. Whether the government based its case on evidence obtained in violation of Rule 6(e) of the Federal Rules of Criminal Procedure.

OPINION

(1) Principal/Agent Relationship

In reviewing findings of fact, this Court is required to apply the clearly erroneous rule. Rule 52(a), Federal Rules of Civil Procedure. *See Vaughn* v. *United States*, 740 F.2d 941, 945 (Fed. Cir. 1984); *Heisig* v. *United States*, 719 F.2d 1153, 1158 (Fed. Cir. 1983). We do not find the Claims Court's finding of fact that JBC and Associates were not under common control to have been clearly erroneous.

Generally, the title holder must bear the tax consequences of transactions involving the property. *See, e.g., Moline Properties, Inc.* v. *Comm'r*, 319 U.S. 436 (1943); *Harrison Property Management Co.* v. *United States*, 475 F.2d 623 (Ct. Cl. 1973), *cert. denied*, 414 U.S. 1130 (1974). Nominal title may be transferred to an agent, allowing the transferor to retain equitable ownership and its tax

consequences. *See Carver* v. *United States,* 412 F.2d 233, 239-40 (Ct. Cl. 1969). However, where the agent and principal are affiliated, it becomes necessary to determine whether a common principal is merely choosing which of two controlled entities it will employ to deal with the property. *See National Carbide,* 336 U.S. at 437.

The Claims Court noted that common control may legally exist in either of two ways, the principal can own a controlling interest in the agent or the same parties may own or control both principal and agent, and that where neither form of common control is present, the concerns expressed in *National Carbide* are not applicable.

Finding that Associates did not control JBC and JBC did not control Associates, the Claims Court concluded that the first form of control did not exist. Concluding that the second form did not exist, the Claim Court said, "JBC, the agent, was controlled entirely by the Pomponios; Associates, the principal, was owned equally by the Pomponios and the Tenzer group, with neither party holding a controlling interest." 3 Cl. Ct. at 462.

The government's assertion that the Pomponios as general partners totally dominated Associates, and that the Tenzers exercised no meaningful control, finds no support in the record. The government quotes the Claims Court's oral statement that "there was an intended sharing of control", implying that the Claims Court found the parties' intention to have gone unfulfilled. However, the government disregards the Court's three sentences immediately following:

> That looking at the share of control one cannot look at every week and every day of the partnership as a separate measure. One must look at their intended duration of the partnership . . . which included not only construction of the building but also the rent from the management of the building. And that in that

> light there was a sharing of control although at various parts of the project one set of partners had more active participation in that control than the other set of partners.

As the Claims Court recognized, *National Carbide* sets forth "six factors" to be considered in determining whether a particular agency arrangement should be respected:

> Whether the corporation [1] operates in the name and for the account of the principal, [2] binds the principal by its action, [3] transmits money received to the principal, and [4] whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. [5] If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. [6] Its business purpose must be the carrying on of the normal duties of an agent. [336 U.S. at 437.]

3 Cl. Ct. at 462. The Claims Court correctly reviewed each of those "factors" in determining that a principal-agency relationship existed between Associates and JBC.

(2) Personal Liability - Section 752

(a) Introduction

Pursuant to Sec. 701,[2] a partnership does not pay federal income tax. The individual partners do. *See* §§ 702,

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[2] All statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.) as amended and as applicable in the years at issue.

704(a). The partnership loss that a partner may deduct is limited to that partner's adjusted basis in his partnership interest, determined at the end of the partnership's taxable year. *See* § 704(d). The basis of a partnership interest acquired by contribution to a partnership is the value of the contributed money or property. *See* § 722.

A partner's basis of his partnership interest is subject to adjustments. Under Sec. 752(a), an increase in a partner's share of partnership liabilities is considered a contribution of money. Such a contribution results in an increase in the partner's basis of his partnership interest. *See* § 722. As explained in the Regulations:

> For example, partnership AB borrows $1,000. If A and B are equal partners, the basis of the partnership interest of each is increased by $500 since each is considered under section 752(a) to have contributed that amount of money to the partnership.

Treas. Reg. § 1.752-1(a)(1). *See generally Laney* v. *Comm'r*, 674 F.2d 342, 345-46 (5th Cir. 1982).

The Treasury Regulations govern the allocation of a partnership's liabilities. Sec. 1.752-1(e) provides:

> (e) *Partner's share of partnership liabilities.* A partner's share of partnership liabilities shall be determined in accordance with his ratio for sharing losses under the partnership agreement. In the case of a limited partnership, a limited partner's share of partnership liabilities shall not exceed the difference between his actual contribution credited to him by the partnership and the total contribution which he is obligated to make under the limited partnership agreement. However, where none of the partners have any personal liability with respect to a partnership liability (as in the case of a mortgage on real estate acquired by the partnership without the assumption

> by the partnership or any of the partners of any liability on the mortgage), then all partners including limited partners, shall be considered as sharing such liability under section 752(c) in the same proportion as they share the profits.

When no partner has any personal liability for a partnership debt, therefore, all partners, including limited partners, "share" that debt in the proportion they share profits, and each partner's basis reflects his debt share. When, however, a partner has "any personal liability" for that debt, the general partners share in it. The limited partners' share, if at all, will depend on the difference between his actual contribution to the partnership and the total contribution that he is "obligated" to make under the *limited partnership agreement.*

Personal liability for a debt ("recourse indebtedness") means all the debtor's assets may be reached by creditors if the debt is not paid. Personal liability is normally contrasted with limited liability ("nonrecourse indebtedness"), against which a creditor's remedies are limited to particular collateral for the debt. Indeed, a partner's guarantee of a partnerships' "nonrecourse debt" makes him personally liable because the partner has exposed his assets to pay the debt if the partnership defaults, precluding the limited partners from sharing in the debt. *See* McKee, Nelson & Whitmire, Federal Taxation of Partnerships and Partners ¶ 8.02[3] (1977); Willis, Pennell & Postlewaite, Partnership Taxation § 45.04 (3d ed. 1984).

(b) The Guarantee

The Claims Court held that the Pomponios guaranteed the construction loan in a nonpartner capacity, and assumed that personal liability of partners is to be accounted for in allocating basis only if that liability is

incurred in their capacity as partners. It reasoned that if the general partners, the Pomponios, were called on to meet their guarantee, they would become creditors of the partnership. and viewed that status as distinct from their relationship as partners.

The view that a partner cannot guarantee partnership debt in his capacity as partner because he then becomes a creditor is insupportable. A general partner, who is liable *as such* for the recourse debts of the partnership, has incurred that liability in his capacity as partner. That a general partner compelled to pay those debts also becomes a creditor does not conflict with his continuing liability as general partner. *See Security-First Nat'l Bank of Los Angeles* v. *Lutz,* 322 F.2d 348, 350 (9th Cir. 1963). *See also* UNIFORM PARTNERSHIP ACT §§ 18(a)-(c) and 40(b). Acquisition of creditor status, after meeting the guarantee, does not mean that the guaranteeing general partner did not make the guarantee, and thus incur the liability in his capacity as partner.

The Regulations provide that the capacity in which a partner acts is to be determined, not by *a priori* reasoning, but by examination of "the substance of the transaction." *See* Treas. Reg. § 1.707-1(a). Examining the substance here establishes that the Pomponios did not act at arm's length in guaranteeing the construction loan. They did not charge Associates for the guarantee, as would an unrelated person, nor did Associates agree to pay the Pomponios interest if they were called upon to meet their guarantee.

The Pomponios acted not as unrelated guarantors or creditors might, but in guaranteeing the loan they acted in their capacity as partners. Before the Tenzers were involved, the Pomponios intended to construct Buchanan House on land held by JBC, their own corporation. The Tenzers supplied the needed money on condition that they

would become partners. The Pomponios thus guaranteed the construction loan so that they could profit from that project through their resulting partnership interests. As the Claims Court found: "The guarantee was a prerequisite to obtaining the loan, which, in turn, was *sine qua non* of the deal between the Tenzer group and the Pomponios." 3 Cl. Ct. at 465.

The Raphans' argument that the guarantee's sole purpose was to enable JBC's no-profit sale of its property to Associates for the $2 million to pay the mortgage is without merit. Paying off that mortgage was an indivisible part of the entire plan under which Associates would construct and own the Buchanan House.

That the guarantee was not mentioned in the partnership agreement is insignificant. A partnership agreement does not cover every conceivable act the partners might take in the course of their partnership activity. Moreover, the guarantee was known to the Tenzers. It is common, because of the risk, for lenders to refuse a construction loan to a closely held corporation without the principals' personal guarantee. *See, e.g.*, R.K. LIFTON, PRACTICAL REAL ESTATE: LEGAL, TAX AND BUSINESS STRATEGIES 210 (1979). The Tenzers, sophisticated real estate investors, obviously knew of that common practice. That Tengran Corp., also a general partner, did not join in the guarantee is equally insignificant. As merely a shell corporation, Tengran Corp.'s guarantee would have been worthless. *See Roccaforte* v. *Comm'r*, 77 T.C. 263, 269 (1981), *rev'd on other grounds*, 708 F.2d 986 (5th Cir. 1983).

The Raphans contend that a guarantee can never create personal liability, under the Regulations, because it is only a conditional or secondary liability. The contention is directly contrary to this Court's conclusion in *Vaughn* that the partners' personal guarantees of partnership debt in *Roccaforte* and *Ourisman* v. *Comm'r*, 82 T.C. 171

(1984), made those "partners * * * personally liable on the mortgage notes." 740 F.2d at 947 n.5. The Raphans' contention confuses unrelated concepts. The first concept involves personal liability (creditor can reach all debtor's assets) and limited liability (creditor can reach only specific assets). The second concept involves primary and secondary liability, which merely refer to the order in which a creditor must pursue his remedies.

Under the guarantee, a creditor could reach all the Pomponios' assets if Associates defaulted. The loan was recourse as against JBC, and JBC consequently was personally liable for that loan. Associates, however, took the loan subject to existing liabilities, but did not assume those liabilities. Therefore, the Pomponios personally guaranteed a loan that was nonrecourse against Associates and thus, became personally liable, regardless of whether they were also primarily liable.[3]

The Raphans' reliance on *Brand* v. *Comm'r*, 81 T.C. 821 (1983), is misplaced. *Brand* involved Sec. 465 which deals with accounting methods, not with the issues presented here. *See* Kalish and Rosen, *The Risky Basis for Partnership Allocations*, 38 Tax. Law. 119, 137-151 (1984).

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[3] A general partner liable as partner for a partnership recourse debt is "personally liable" for that debt. However, a partnership creditor can reach the partner's assets only after exhausting its remedies against the partnership. *See, e.g., May* v. *McGowan*, 194 F.2d 396, 397 (2d Cir. 1952). The Pomponios "unconditionally" guaranteed the loan, and a creditor may therefore proceed against the Pomponios without first exhausting its remedies. *See, e.g., Terry* v. *Tubman*, 92 U.S. 156, 160 (1875). The Pomponios thus had a more direct, immediate liability for the loan than a general partner liable for a partnership debt. Acceptance of that more direct and immediate liability did not, as above indicated, mean that the guarantee was not undertaken in the Pomponios' partnership capacity.

The Pomponios, as general partners, were personally liable for the construction loan when they guaranteed its payment. The Raphans, as limited partners, do not share in that liability.

(3) Alleged Rule 6(e) Violation

The Claims Court properly denied the Raphans' motion to suppress certain documentary evidence.

Certain government exhibits, business documents relating to Buchanan House, were obtained from a grand jury empaneled in 1972 to investigate the Pomponios' affairs. The Raphans say that without these exhibits, the government would have no case.

The Raphans served interrogatories on the government requesting that it identify or produce every document it possessed having any relation to Buchanan House. In response, the government acknowledged existence of such documents, but moved for denial of their discovery, primarily on the ground that they had been obtained by grand jury subpoena and access to them was limited by Rule 6(e) of the Federal Rules of Criminal Procedure.[4]

The Raphans opposed the motion, arguing (1) the documents were not covered by Rule 6(e) because they were sought for their intrinsic value; not to learn what transpired before the grand jury; and (2) the grand jury had long since been terminated.

The Claims Court having denied the government's motion, the government conducted a fifteen month search,

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[4] Pursuant to Rule 6(e), a request for disclosure of grand jury documents must be directed to the appropriate district court. Here, the government's request had been directed to the United States District Court for the Eastern District of Virginia, where the grand jury was convened to investigate the Pomponios' affairs. The request was granted on May 5, 1972.

located over 1,600 documents, and turned them over to the Raphans. The government identified 200 documents as its exhibits and amended its pretrial order accordingly. The Raphans then opposed admission of those exhibits because they were obtained in violation of Rule 6(e).

The Raphans are ill-positioned to oppose admission of the exhibits: (1) they engineered the disclosure of which they complain; (2) they successfully opposed the government's motion on the ground that the documents were *not* subject to Rule 6(e); (3) they caused the government substantial expense in searching for and delivering 1,600 documents to them; and (4) they obtained the benefits of that search.

The Raphans' reliance on *United States* v. *Baggot*, 103 S.Ct. 3164 (1983) and *United States* v. *Sells Engineering, Inc.*, 103 S.Ct. 3133 (1983), is misplaced, the facts in those cases being distinct from those present here.

Finally, the Raphans improperly seek to attack collaterally the 1972 order granting the government access to the documents. That order was entered in a proceeding to which the Raphans were not parties. The documents were not the Raphans', and the Raphans were not targets of the grand jury. The Raphans thus had no standing to challenge the 1972 order directly and have no standing to challenge it here. *Cf. United States* v. *Payner*, 447 U.S. 727 (1980).

CONCLUSION

Accordingly, we affirm that part of the Claims Court's judgment based on its holding that JBC was the agent of Associates but reverse that part of the judgment holding that no general partner had personal liability under the construction loan. That reversal requires that the limited partners, the Raphans, must be held disentitled to a step up in basis under Treas. Reg. Sec. 1.752(e).

AFFIRMED-IN-PART, REVERSED-IN-PART

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 84-783

452-78

BENJAMIN RAPHAN & MYRNA RAPHAN,
Appellee,

v.

THE UNITED STATES,
Appellant.

JUDGMENT

ON APPEAL from the United States Claims Court

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED IN PART AND REVERSED IN PART. The reversal requires that the limited partners, the Raphans, must be held disentitled to a step up in basis under Treas. Reg. Sec. 1.752(e).

DATED April 4, 1985

ENTERED BY ORDER OF THE COURT
George E. Hutchinson, Clerk

/s/ GEORGE E. HUTCHINSON, Clerk

ISSUED AS A MANDATE: May 31, 1985

COSTS: Against, Appellees, Benjamin and Myrna Raphan

PRINTING	$1,252.44
TOTAL	$1,252.44

APPENDIX B

UNITED STATES COURT OF CLAIMS

No. 452-78

BENJAMIN AND MYRNA RAPHAN

vs.

THE UNITED STATES

CLERK'S OFFICE

Washington, D. C., February 29, 1980

To Attorney of Record and Assistant Attorney General, and Trial Judge Browne

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiffs' motion, filed January 30, 1980, for protective order

the following order: by Trial Judge

DENIED, without prejudice to right of defendant to renew motion in the event plaintiff seeks to compel production of documents after defendant has answered or objected to the subject interrogatories, (See *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211 (1979); *Untied States v. Interstate Dress Carriers, Inc.,* 280 F.2d 52 (2d Cir. 1960).

Very truly yours,

/s/ [Illegible]

Clerk, Court of Claims.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal No.

UNITED STATES OF AMERICA

v.

JOHN DOE

ORDER

Upon the application of Brian P. Gettings, United States Attorney, Eastern District of Virginia, requesting on behalf of the United States of America an Order partially lifting the secrecy of the above Grand Jury proceedings in connection with an investigation into the affairs of Lewis J. Pomponio, Sr., Lewis J. Pomponio, Jr., Peter Pomponio, Paul Pomponio, and others for possible violations of federal tax laws and Title 18, United States Code, for the purpose of releasing to the Internal Revenue Service various books, papers, records, and transcripts used and to be used in the above proceedings for both civil and criminal tax purposes and other criminal purposes; and it appearing to the Court it is necessary for the Internal Revenue Service to have the aforesaid books, papers, records, and transcripts in order to properly and efficiently conduct its investigation, it is, therefore,

ORDERED that the secrecy of the aforesaid Grand Jury proceedings be lifted to the extent that authorized representatives and agents of the Internal Revenue Service may have access to books, papers, records, and testimony which may be produced in said proceedings, and it is further

ORDERED that the transcripts of testimony and documentary evidence used, presented, and acquired, and to be used, presented, and acquired for said Grand Jury proceedings may be turned over to the authorized representatives and agents of the Internal Revenue Service for purposes of carrying out their responsibilities in any and all proceedings of a civil or criminal nature.

/s/ OREN R. LEWIS
United States District Judge

Alexandria, Virginia

Date: May 5/72

I ask for this:

BRIAN P. GETTINGS
United States Attorney

By: /s/ THOMAS K. MOORE
Thomas K. Moore
Assistant United States Attorney

A True Copy, Teste:
W. Farley Powers, Jr., Clerk
By /s/ [Illegible]
Deputy Clerk

APPENDIX D

IN THE UNITED STATES CLAIMS COURT

No. 452-78

BENJAMIN AND MYRNA PAPHAN,
Plaintiff,

vs.

THE UNITED STATES,
Defendant.

501 Courtroom No. 4
717 Madison Place
Washington, D. C.

Thursday,
March 24, 1982

The above-entitled matter came on for hearing, pursuant to notice, at 11:25 a.m.

BEFORE: HON. ALEX KOZINSKI
Chief Judge

APPEARANCES:

For the Plaintiff:

RALPH A. MUOIO, ESQ.
SCOTT MICHAELS, ESQ.

For the Defendant:

ELLEN C. SPECKER, ESQ.
Civil Division
Department of Justice
550 11th Street N. W.
Washington, D. C.

• • •

[18] 6(e) order was issued, it needs another 6(e) order and it doesn't have it.

MS. SPECKER: Your Honor, in one of the Pomponio cases—in fact, in several of them—I believe that documents were released to the Internal Revenue Service during a three- or four-month period prior to the issuance of the 6(e) order in May of '72 and the Fourth Circuit never viewed it as assignment of error for ground for reversal of the conviction.

MR. MUOIO: What we're talking about here, Your Honor, is the use of the grand jury material for civil purposes, letally prohibited.

THE COURT: It didn't seem to get Judge Lewis' dander so I'm not sure it would get my dander up.

First of all, I read the transcripts as unclear in some spots but I read the transcripts at pages 12 and 13 and also page 15 of the hearing before Judge Lewis as ruling that the May 1st order permitted release of information to the IRS for purposes of carrying out its responsibilities in any normal proceeding of a criminal or civil nature, and that Judge Lewis meant that to include introduction of evidence in those cases.

I think that is fairly clear from the face of the transcript.

Now that's not perhaps the way I would interpret [19] the order, but he is the one who wrote it and therefore his interpretation is binding.

Now the question of whether or not he was authorizing the release of grand jury materials going beyond the very grand jury empaneled in May of 1972 is a little more—Unfortunately it's something on which Judge Lewis did not offer that much enlightenment on except to the effect that he seemed to view the entire investigation as one

unit—he talked about tons of documents, truckloads of documents and the like.

If you look, it says, "Upon application of Brian P. Geddings, United States Attorney, requesting on behalf of the United States of America an order partially lifting the secrecy of the above grand jury proceedings on connection with an investigation into the affairs of Louis A. Pomponio, Sr., Pomponio, Jr., Peter Pomponio, Paul Pomponio and others, for possible violations of federal tax laws under Title 18, United States Code for purposes of releasing to Internal Revenue Service."

Now the question is whether or not that order is limited to that grand jury or to the investigation at the grand jury proceedings in connection with the investigation as a whole.

In light of Judge Lewis' seeming unconcern with the release of these documents if they were in the hands of [20] the Government, I'm going to read the order broadly and therefore I will rule that the materials were covered by the May 1st, 1972, order and therefore releasable.

As a hedge against the possibility that I may be wrong on that, I will order sealed documents which have not otherwise been made public, and therefore the only other people in the world who will know about the case, other than the people who already know, who will be me and my law clerk, and perhaps my secretary, and will be in the clerk's office and perhaps the court of appeals.

If I'm mistaken on that point, at least we won't have made a travesty of the grand jury proceedings and Eastern District of Virginia by exposing it to any further publicity.

So if you can identify, Mr. Muoio, docuents which are not public and which therefore—except for the 6(e) order might still be on the grand jury secrecy—I'll place them

under seal and that way only the court will know about them.

I think that's a fair reading of Judge Lewis' order, and I think that's probably a good precaution in any case because what he seemed to be saying is that if you have them you can introduce them in this other proceeding and it's up to the judge in the other proceeding to regulate, to decide whether or not they are going to come in. [21] Again, it's difficult to know exactly what was going on in Judge Lewis' mind, but concern for—serious concern for the continued secrecy of the grand jury proceedings that took place more than ten years ago or whenever didn't seem to have been uppermost in his mind on that particular day.

I guess one can wish that he had been more explicit in his rulings, but I see this court's function as serving the court that empaneled the grand jury. If we are to impose secrecy, it is because we feel that that court itself would do the same and that we are as a matter of comity not helping in the violation of its grand jury procedures.

When the judge who empaneled the grand jury shows as much unconcern about the issue as Judge Lewis showed in this case, I can only say we'll do the best we can but we're not going to keep things out on the basis of that.

I'm willing to place things under seal and if you people can identify documents particularly and bring them forward, we'll keep them sealed in the record.

APPENDIX E

IN THE UNITED STATES CLAIMS COURT

No. 452-78

BENJAMIN AND MYRNA RAPHAN,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Room 501
Claims Court
717 Madison Place, N.W.
Washington, D. C.

Monday,
February 7, 1983

The parties met, pursuant to notice of the Judge, at 3:10 p.m.

BEFORE: HON. ALEX KOZINSKI
Chief Judge

APPEARANCES:

For the Plaintiff:

RALPH A. MUOIO, ESQ.
Caplin and Drysdale, Chartered
1101 - 17th Street, N.W.
Washington, D. C. 20036

For the Defendant:

ELLEN SPECKER, ESQ.
U. S. Department of Justice
Tax Division
Washington, D. C. 20530

• • •

PROCEEDINGS

[2] THE COURT: Calling Case No. 452-78, Raphan versus the United States.

Will counsel identify themselves for the record?

MR. MUOIO: Ralph Muoio for the plaintiff.

MS. SPECKER: Ellen Specker for the defendant.

THE COURT: Good afternoon.

MS. SPECKER: Good afternoon.

THE COURT: Here we are again on what I am sure must be the case with the most appearances on my docket.

Last we met on this record we were discussing grand jury disclosure of the case from the United States District Court for the Eastern District of Virginia at 550 Fed Sup 1171. I had indicated that at least my reading of it suggested that that Court considers material submitted to the grand jury as being grand jury materials, and I felt myself bound to follow that ruling and maintaining the integrity of the grand jury process in that particular Court.

If I recall correctly, defense counsel then suggested another conference at the point where she had had a chance to read and review the decision in greater detail.

The ball is in your court, Ms. Specker. What do you suggest?

MS. SPECKER: Your Honor, the Government submits that the decision is wrong and that it should be disregarded. [3] In the event, however, that you do grant plaintiff's motion to suppress on the basis of that decision, I am now authorized to apply for a 6(e) order, but only in the event that there is a ruling on the record on plaintiff's outstanding motion.

THE COURT: Okay. We were on the record last Friday, and I think I ruled on it then. If I didn't, I will do so now.

MS. SPECKER: Okay.

THE COURT: I don't feel—I think you should understand the basis of my ruling and the analytical framework.

The question is not on the suppression of punishment, as plaintiff would have it. I feel that possession of the materials by the Government lawyers was perfectly appropriate under 6(e), under the 6(e) order and 6(e) itself. The question is one of protecting the integrity of the grand jury process in the Eastern District of Virginia, and that is within my authority not to allow publication of materials which that Court considers to be nondisclosable.

Since that is where my authority comes from, essentially I am serving that Court in helping it maintain the integrity of its grand jury process. I feel bound by the decisions of that Court. It's more than a matter of comity. [4] It's the very linchpin, it's the very reason why I would exclude the evidence altogether. I am doing it to help them, in a sense. If they feel that that protects their grand jury process, I don't feel I'm in a position to disagree with them.

Had the question been an open one in that particular district or in that particular circuit, I would then have had to guess whether—or make an independent decision as to whether—I think they would consider these to be grand jury materials, but that is no longer open to me.

So I will rule that these are grand jury materials, and subject to the two issues we had left for possible determination on the basis of facts, specifically one of them being whether the materials had otherwise become public,

I will grant the motion for—well, it's really not a motion for suppression. I guess it is——

MR. MUOIO: Just exclude.

THE COURT: Exclude from evidence. I will not allow them to be published on the record in this Court or in this courtroom. So, I guess it imparts a suppression motion, but essentially it sustains an objection to the introduction of materials into evidence, again subject to a showing that they have otherwise become public, in which case excluding them would serve no purpose.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

IN RE: GRAND JURY PROCEEDINGS

APPLICATION FOR DISCLOSURE

Friday, February 18, 1983

Alexandria, Virginia

The proceedings commenced at 10:00 o'clock a.m.

BEFORE:

THE HONORABLE OREN R. LEWIS

APPEARANCES:

JOSEPH J. ARONICA, Esquire, Assistant United States Attorney, and

ELLEN SPECKER, Esquire, Department of Justice, Tax Division, 414 11th Street, N.W., Room 4108, Washington, D.C. 20530.

ROBERT C. DUNN, Esquire, Cohen, Annand, Dunn & Sinclair, P.O. Box 117, Alexandria, Virginia, 22313, and

RALPH A. MUOIO, Esquire and SCOTT D. MICHEL, Esquire, Caplin and Drysdale, 1101 17th Street, N.W., Washington, D.C. 20036, Counsel for the Applicant for Intervention.

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[18] they went in and testified to the Grand Jury. The Grand Jury wouldn't be looking at all those documents.

They wouldn't know what they said if they looked at it.

MR. MUOIO: I would request that you issue no orders today.

THE COURT: Are you asking me—Mr. Aronica, you and the young lady, asking me to issue any order?

MR. ARONICA: Frankly, the Government feels that we don't need another Order because the 6(e) covered all matters that were released to the Internal Revenue Service and we can use it once we have it.

THE COURT: Well, that's the answer, then.

MR. ARONICA: And that's what we understand the Court to be saying.

THE COURT: I say, the Order speaks for itself. That's all I said, and I made it clear that I'm not entering an Order that affects any other Court. That's up to that Court.

MR. ARONICA: Our position is that once the documents were released under the original 6(e) Order, there is no requirement to get another Order.

THE COURT: All right, that answers that.

MR. MUOIO: And our position, just for the record [19] is that that 6(e) Order does not cover the documents that the Government seeks to use.

THE COURT: I don't know whether it does or not, but I'm not called upon to answer it.

MR. MUOIO: Thank you, Your Honor.

THE COURT: I am not going to answer it. I will put it that way. So you are right back where you were. I'm not saying you can or can't.

(Whereupon, at 10:20 a.m., the hearing in the above-entitled matter was concluded.)

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-11

In the Supreme Court of the United States

OCTOBER TERM, 1985

BENJAMIN RAPHAN AND MYRNA RAPHAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

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26 C.F.R. 1.752-1(e) 4

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-11

BENJAMIN RAPHAN AND MYRNA RAPHAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this federal income tax case, petitioners seek review of an evidentiary ruling that did not affect the outcome of this case and in any event is not worthy of further review.[1]

This suit arises out of the Commissioner's disallowance of losses claimed by a limited partnership in 1970 and 1971, allegedly resulting from the construction by the partnership of an apartment building known as the James Buchanan project (Pet. App. 1a; C.A. App. 11-24). Petitioner Benjamin Raphan, through a series of intermediate partnerships, claimed $2,924 of the losses in 1970 and $5,330 in 1971 (C.A. App. 14). Petitioners paid the additional taxes

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[1]The court of appeals' opinion is reported at 759 F.2d 879. The Claims Court's opinion, which is not reproduced in the appendix to the petition, is reported at 3 Cl. Ct. 457.

resulting from the disallowances and sued for a refund in the Claims Court (C.A. App. 10-15).

After bringing suit, petitioners served interrogatories on the United States, requesting that it identify, by complete description of title and contents, every document in its possession having any relation to the James Buchanan project or, in lieu of describing the documents, produce a copy of each such document (C.A. App. 48). The individual general partners in the partnership were members of the Pomponio family, who had been the subject of a grand jury investigation relating to their numerous business ventures, including the Buchanan project. This investigation culminated in several indictments and convictions. C.A. App. 48-50, 214. See, *e.g.*, *United States* v. *Pomponio*, 429 U.S. 10 (1976). In response to the interrogatories, the United States acknowledged that such documents existed but sought a protective order against their discovery, primarily on the ground that the documents had been obtained by grand jury subpoena and that, consequently, access to those documents was limited by Rule 6(e), Fed. R. Crim. P. Pursuant to Rule 6(e), a request for disclosure of grand jury documents must be directed to the appropriate district court (C.A. App. 48-50). Petitioners opposed the motion, arguing (1) that the documents were not covered by Rule 6(e) because they were sought "for their own intrinsic value, not to disclose what transpired before the grand jury"; and (2) that the grand jury had long since been terminated and, thus, the government's claim of grand jury secrecy was "untenable" and had a "total lack of merit" (C.A. App. 57-58).

The Claims Court denied the United States' motion for a protective order (C.A. App. 68).[2] The attorney for the United States then began a search through a vast quantity of

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[2]The Claims Court denied the United States' motion for a protective order "without prejudice * * * to renew[al of the] motion in the event plaintiff seeks to compel production of documents after defendant has

documents obtained by the grand jury. This search took one year and three months to complete and located more than 1,600 relevant documents, all of which were turned over to the taxpayers. C.A. App. 83. In 1981, after reviewing the documents, the United States decided that it would like to use as its own exhibits some 200 of those documents, consisting of various business records relating to the Buchanan project, and amended its pretrial order to that effect (C.A. App. 70, 86).

Petitioners opposed admission of the government's exhibits on the ground that "they were obtained in violation of Rule 6(e)" (C.A. App. 103; see also C.A. App. 112-117, 144-160). The United States argued, inter alia, that it had properly obtained the grand jury documents pursuant to an ex parte order dated May 5, 1972 (C.A. App. 180-181) of the United States District Court for the Eastern District of Virginia (C.A. App. 221-224).

At the Claims Court's suggestion, the United States sought clarification from the district court that issued the 1972 order as to the use of the grand jury materials at the trial in this case (Pet. App. 26a-27a; C.A. App. 391-409). The district court indicated that its 1972 order was clear and did not require clarification (Pet. App. 29a). Following the district court proceedings, the Claims Court concluded that the 1972 order was intended to permit the IRS both to use the evidence in conducting a civil tax investigation and to

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answered or objected to the subject interrogatories" (C.A. App. 68). If the documents were in fact grand jury materials subject to Rule 6(e), however, merely describing their contents, as the interrogatories required, would have violated Rule 6(e) (C.A. App. 50). Moreover, in order to answer the interrogatories, the government attorney would be required to search through a vast quantity of documents. After entry of the Claims Court's order, the United States concluded that the documents were not subject to Rule 6(e) and complied with petitioners' interrogatories and the court's order by producing all of the relevant documents.

release that evidence to the Department of Justice for introduction in court proceedings, such as this case (Pet. App. 21a-23a).

Following a four-day trial, the Claims Court rendered its opinion on September 26, 1983 (C.A. App. 663-674). The court rejected the government's arguments (1) that the losses in question were attributable to a corporation controlled by the Pomponios and not to the partnership, and (2) that even if the losses were attributable to the partnership, the petitioners lacked sufficient basis in their partnership interest to deduct the losses (*ibid.*).

On appeal, the United States Court of Appeals for the Federal Circuit agreed with the Claims Court that the losses were attributable to the partnership (Pet. App. 6a-8a), but reversed on the basic issue (Pet. App. 8a-14a). The court of appeals concluded that the Pomponios had guaranteed the construction loan in their capacity as partners and had thus become personally liable for that loan. Under 26 C.F.R. 1.752-1(e), it followed that only the general—but not the limited—partners could increase their partnership bases with respect to that loan. This left the petitioners with insufficient basis to deduct the losses.

Petitioners conceded that the 1972 disclosure order authorized the use of the grand jury documents in the Claims Court but argued that the order was erroneous and that the documents consequently should be suppressed. The court of appeals rejected this argument because (1) the petitioners' litigation conduct estopped them from making the argument, (2) petitioners lacked standing to dispute the order, and (3) their reliance on *United States* v. *Baggot*, 463 U.S. 476 (1983), was misplaced (Pet. App. 14a-15a).

1. Petitioners seek review only of the ruling on their evidentiary motion; they do not seek review of the appellate court's adverse holding on the merits. For several reasons, review by this Court is not warranted.

To begin with, the ruling on their evidentiary motion did not affect the outcome of the case. If their motion had been granted, the only relevant consequence would have been to exclude from evidence the general partners' guarantee of the construction loan. However, one of petitioners' own exhibits, the construction loan commitment, shows that the lender required the Pomponios' personal guarantees as a condition for obtaining the construction loan (C.A. App. 1496). Thus, even if petitioners' motion had been granted, the evidence still would have established that the loan was guaranteed, and the court's ruling that petitioners consequently had insufficient basis to deduct the losses thus would not have been affected.

Moreover, as the court of appeals recognized (Pet. App. 15a), petitioners are "ill-positioned to oppose admission of the exhibits" since they (1) engineered the very disclosure of which they now complain; (2) successfully opposed the government's motion on the very ground that the documents were *not* subject to Rule 6(e); (3) caused the government to expend a massive amount of attorney time searching a vast quantity of documents; and (4) obtained the benefits of their discovery request by receiving more than 1,600 documents. The denial of petitioners' motion for suppression was supported by the rule that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."[3] *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895).

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[3]Petitioners incorrectly assert (Pet. 10 n.*) that estoppel cannot be applied against them because the 1972 order was "invalid as a matter of law." Equitable estoppel presumes that a party's litigating conduct may bar that party from raising an otherwise meritorious argument. Nor does estoppel apply here against the United States, as petitioners suggest (Pet. 10 n.*). After the United States' motion for a protective order

2. In any event, petitioners lack standing to challenge the 1972 disclosure order, as the court below held (Pet. App. 15a). They were not targets of the grand jury investigation, nor did they even appear as witnesses. Moreover, the only document now relevant, the loan guarantee, is a pre-existing business record that does not even refer to the petitioners.[4] Thus, the facts do not support their suggestion (Pet. 6-7) that they are "innocent person[s] * * * involved in a grand jury investigation" and that they are seeking to keep secret the fact of their investigation.[5] Petitioners' reliance (Pet. 5-6) on *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), where targets of the grand jury investigation opposed release of transcripts of their own grand jury testimony, thus plainly is misplaced.

Moreover, even if petitioners had standing to challenge the 1972 disclosure order, they raised their objections in the wrong forum. The 1972 order was an order by the court having supervisory control over the grand jury, and that order was effective until reversed or modified. Petitioners should have sought any desired modification of the disclosure order in that court.[6] See *In re Grand Jury Proceedings,*

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was denied, it complied with petitioners' interrogatories, and it abandoned its argument that the documents were barred from disclosure under Rule 6(e). The United States thus has not "contended from the beginning that disclosure was improper" (Pet. 10 n.*).

[4]Indeed, with the exception of three exhibits that simply list Mr. Raphan as one of twenty members of a law firm none of the other exhibits contains a direct reference to Mr. Raphan (C.A. App. 226 & n.4).

[5]The fact that the grand jury subpoenaed material relating to the Pomponios' activity in the Buchanan project (among many other deals) appears in publicly filed documents in the criminal cases against the Pomponios and thus is a matter of public record (C.A. App. 214, 462, 465, 468, 473-475, 493, 496, 499).

[6]Petitioners sought to intervene in the proceeding in the Eastern District of Virginia regarding the 1972 disclosure order and argued that the 1972 order did not cover the documents in question (C.A. App.

Miller Brewing Co., 687 F.2d 1079, 1095-1096 (7th Cir. 1982); *In re Proceedings Before the Federal Grand Jury*, 643 F.2d 641 (9th Cir. 1981).

3. Even if we assume that petitioners could challenge the 1972 disclosure order in the Claims Court, that order, insofar as it affects this case, is not erroneous.[7] The order authorized disclosure of grand jury matters to the government for use both in civil tax investigations and in civil tax cases, such as the instant case. *United States* v. *Baggot, supra*, on which petitioners rely (Pet. 8-9), holds that Rule 6(e) does not authorize disclosure to the IRS for investigatory purposes prior to any actual judicial proceeding. Here, however, the disclosure of which petitioners complain was made directly to a Justice Department attorney during, and for use in, the instant judicial proceeding, and thus was valid under *Baggot*.[8]

Finally, even if the 1972 order were inconsistent with *Baggot*, suppression is not an appropriate remedy. Pursuant to a facially-valid disclosure order, grand jury documents were disclosed to both a Justice Department attorney

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404-409). The motion to intervene was not acted upon, and petitioners did not seek any further relief in that court.

[7]It is highly questionable whether Rule 6(e) has any application here, since the documents in question were pre-existing documents sought for their intrinsic value and not to reveal the workings of the grand jury. See, *e.g.*, *In re Special February 1975 Grand Jury*, 662 F.2d 1232, 1244 (7th Cir. 1981), aff'd on the other grounds *sub nom. United States* v. *Baggot*, 463 U.S. 476 (1983). The Claims Court thus appears to have erred in concluding here that the documents were subject to Rule 6(e) (C.A. App. 358).

[8]Below, petitioners also argued that the United States had not established "particularized need" for disclosure of the grand jury documents (see Pet. 4). Petitioners do not advance that argument in their petition. Indeed, they in effect conceded the existence of particularized need by asserting below (Appellee's Br. 45) that without the exhibits "the government would have no case at all."

and petitioners in 1980 and were admitted as evidence in the trial below held in early May 1983. After the four-day trial was completed and oral findings were made (C.A. App. 1366-1419), this Court issued its opinion in *Baggot*. That holding should not, under the circumstances of this case, be applied so as to invalidate retroactively the use of the guarantee as evidence. The United States relied on the 1972 disclosure order by not seeking to obtain the guarantee through discovery.[9] It thus would seriously prejudice the government's interests to invalidate retroactively the use of that exhibit. Moreover, that document is referred to in the courts' opinions and is now a matter of public knowledge. No purpose would be served by retroactively invalidating the use of that exhibit.[10] Indeed, since suppression here could plainly have no deterrent effect, it should not be available as a remedy. *United States* v. *Leon*, No. 82-1771 (July 5, 1984); *Gluck* v. *United States*, No. 84-5282 (3d Cir. Aug. 28, 1985); *Graham* v. *Commissioner*, No. 84-5366 (3d Cir. Aug. 28, 1985).[11]

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[9]Since petitioners' own exhibits, produced in 1979, referred to the guarantee, the government had an independent source of knowledge of the existence of the guarantee.

[10]Cf. *Alexander* v. *Commissioner*, 476 F.2d 974 (5th Cir. 1973) and *Romanelli* v. *Commissioner*, 466 F.2d 872, 875-877 & n.3 (7th Cir. 1972) (refusing to suppress evidence obtained under valid search warrants, where later Supreme Court cases removed the legal basis for those warrants.)

[11]Petitioners' reliance (Pet. 8-10) on *In re Sells*, 719 F.2d 985 (9th Cir. 1983), is entirely misplaced, and there is no conflict with that decision. That case was an appeal from a district court order disclosing grand jury materials, and the Ninth Circuit applied *Baggot* on the ground that "an appellate court should apply the law as it stands on the date of the appellate decision" (*id.* at 990). Here, an entirely different question is presented, viz., whether documents released pursuant to a long-standing Rule 6(e) order and introduced into evidence in a civil trial should retroactively be suppressed where, in light of a subsequent opinion, the disclosure order is determined to have been erroneously granted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General

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